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33 **UNITED STATES DISTRICT COURT**
34
35 **NORTHERN DISTRICT OF CALIFORNIA**
36
37 **SAN FRANCISCO DIVISION**

38 MAXIMILIAN KLEIN, et al., on behalf of
39 themselves and all others similarly situated,

40 Plaintiffs,

41 v.

42 META PLATFORMS, INC., a Delaware
43 Corporation,

44 Defendant.

45 Case No. 3:20-cv-08570-JD

46 **META PLATFORMS, INC.'S REPLY
47 MEMORANDUM IN SUPPORT OF
48 MOTION TO EXCLUDE TESTIMONY
49 OF NICHOLAS ECONOMIDES**

50 Judge: Hon. James Donato

51 Hearing Date: December 14, 2023
52 Time: 10:00 a.m.

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INTRODUCTION

Users' opposition only confirms that the opinions of putative expert Nicholas Economides should be excluded as inadmissible junk science.

First, Users claim that “Real-World Examples, Extensive Record Evidence, and Accepted Economic Theory and Literature” support Economides’s opinion that in his but-for world, Meta would have paid its users. Not so. No economic theory or literature supports the speculation that Meta would have responded to competition by paying users (which no one has ever done) rather than by innovating and creating more engaging content (as Meta and all its competitors have always done in the real world). Users do not cite any “real world examples” of a platform paying users just to use it, whatever competition it faced. Instead, their record evidence shows that Meta already offers users a valuable service, supported through ads, and that Meta would never upend this established business model for another, never-before-seen one. That is why Meta rejected every instance Users identify of someone hypothesizing paying users—and even then, Users never point to anyone ever considering *all* users getting *uniform* payments. An expert cannot simply proclaim that *he thinks* some unspecified increment of additional competition would transform an attention platform that provides content that users value and enjoy into a market research firm that must pay its participants. Users’ opposition shows that Economides’s guess is all he has.

Second, Users claim Economides reliably used a yardstick method. A reliable yardstick study, however, must adjust for the indisputable differences between Facebook and Economides’s market research program “yardsticks.” But Economides made no adjustments to the price those programs pay and the price he claims Meta would have paid Facebook users. Skipping that critical step makes his opinion unreliable and inadmissible.

Third, Users argue that Economides can offer his personal, lay opinion that Facebook's data practices and user settings were "confusing" in rebuttal to Meta's expert Catherine Tucker and because Economides's academic studies have included privacy. This opinion is neither rebuttal nor within Economides's academic purview. And even if it were, Economides still could not offer what he concedes is [REDACTED] that he came to simply [REDACTED] Ex. 3,

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1 Economides Tr. 47:24-48:6.¹ Expert testimony must be grounded in “the expert’s scientific,
 2 technical, or other specialized knowledge” in a way that “will help the trier of fact to understand
 3 the evidence or to determine a fact in issue.” Fed. R. Evid. 702. Economides’s idiosyncratic
 4 experiences and subjective conclusions about whether Facebook’s disclosures are “confusing” (a
 5 view that courts have disagreed with as a matter of law) does not fit the bill.

ARGUMENT

7 **I. ECONOMIDES’S *IPSE DIXIT* OPINION THAT META WOULD HAVE RESPONDED TO MORE
 8 COMPETITION BY PAYING ITS USERS SHOULD BE EXCLUDED**

9 Opining on the but-for world is not license to dream up a fantasy world. An expert cannot
 10 say the sky is green—or that it *would be* green in his but-for world—based just on his say so.
 11 Courts thus exclude opinions where “there is simply too great an analytical gap between the data
 12 and the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *McGlinchy v. Shell
 13 Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (affirming exclusion of opinion that “rests on
 14 unsupported assumptions” and “has scant basis in the record”); *Persian Gulf Inc. v. BP W. Coast
 15 Prods. LLC*, 632 F. Supp. 3d 1108, 1168 (S.D. Cal. 2022) (excluding opinion lacking “some logical
 16 relationship to the evidence in the case”). That is the case here.

17 Economides’s central opinion is that “in the but-for (*i.e.*, competitive) world, Facebook
 18 would have had to compensate its users for their data.” Opp. 5. This is a bold claim that ignores
 19 entry and market participation in his own alleged market. Facebook competes for user time and
 20 attention, as Economides concedes. *See* Ex. 1, Economides Rep. ¶ 225.² So when Snapchat began
 21 capturing attention with fleeting pictures and videos in a feed, Meta did not respond by [REDACTED]
 22 [REDACTED]. It did the obvious—it created Stories with
 23 new and engaging features. When Tik Tok emerged, Meta didn’t [REDACTED]

24 ¹ Unless otherwise noted, emphasis is added and “Ex.” citations reference exhibits 1-7 to the
 25 Gringer Declaration, Dkt 650-1, exhibits 8-12 to the Supplemental Gringer Declaration, Dkt. 653,
 26 or exhibits 13-19 to the Gringer Reply Declaration submitted herewith.

27 ² The parties dispute how to define the market in which Facebook competes, *see* Meta’s Opp. to
 28 Users’ Motion for Class Certification, Section I.C.2, contrary to Users’ assertion (made before
 Meta filed its class certification opposition) that “Facebook has already [REDACTED]” Opp. 7. But whether Facebook competes in
 Economides’s “Personal Social Network Market,” it indisputably competes with numerous other
 firms for user time and attention—which creates the incentives that Economides ignores.

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1 [REDACTED]. It created Reels (and Snap created Spotlights and YouTube created Shorts).
 2 Snap and Tik Tok themselves, of course, did not compete *with Meta* by offering to pay users of
 3 their platforms. Like Meta, they competed by innovating. As Economides admits, no attention
 4 platform has ever responded to competition by paying all its users. [REDACTED]

5 [REDACTED] Ex. 13, Economides Tr. 84:11-16. Courts exclude expert opinions
 6 that lack a basis in reality, *see, e.g., McGlinch*y, 845 F.2d at 807, and the Court should do so here.

7 Users' efforts to find the best "Real-World Examples," "Record Evidence," and "Economic
 8 Theory and Literature" for Economides's wild claim, Opp. 5-10, fail to save him from exclusion.

9 As an initial matter, no economic theory supports Economides's opinion that Meta would
 10 have competed by paying users rather than improving quality, such as with new features. Users
 11 argue that "Where, as here, the starting money price is 'zero,' additional competition should drive
 12 the money price to be 'negative,' such that users receive compensation." Opp. 2. Economides
 13 testified that [REDACTED]

14 [REDACTED]
 15 [REDACTED] Ex. 13, Economides Tr. 102:16-19. But no economic theory bridges the gap
 16 between how Meta actually competes (on quality) and how Economides speculates it would.
 17 Users' sources instead recognize that "markets where goods are free will be dominated by the best
 18 quality firm and others may compete only in so far as they can differentiate their offers and target
 19 different customers." STIGLER COMM. ON DIGIT. PLATFORMS, MARKET STRUCTURE AND
 20 ANTITRUST SUBCOMMITTEE REPORT 55 (July 2019). Users' putative expert Joseph Farrell agrees:

21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24 [REDACTED] Ex. 14, Farrell Rep. ¶ 57. The fact that
 25 "negative prices" exist in *some* unique situations, like certain markets for hard-to-store
 26 commodities such as electricity or oil,³ does not show that *this* market for time and attention would
 27 have converted to that unusual model with an undefined amount of additional competition.

28 ³ *See, e.g., Bloomberg, "One Corner of U.S. Oil Market Has Already Seen Negative Prices"* (March 27, 2020).

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1 Users' alleged "real world examples" are nothing of the sort. None of Facebook's "Study
 2 and Research programs" or "companies like Google, Nielsen, Comscore, and Amazon" pays
 3 people just for using an attention platform. Opp. 6. Ideas that Meta *rejected* are not "real world"
 4 examples of anything. The case Users rely on, *In re Glumetza Antitrust Litigation*, 2021 WL
 5 1817092 (N.D. Cal. May 6, 2021), supports this Court's view that it does not "get you anywhere"
 6 to "stand up and tell the jury, 'Here's a program. They never did it, but they thought about it.'"
 7 June 22, 2023 Hr'g Tr. 22:2-6. In *Glumetza*, Judge Alsup held that it was irrelevant whether
 8 defendants "contemplated any of plaintiffs' but-for scenarios." 2021 WL 1817092, at *13. Rather,
 9 he denied defendants summary judgment because "plaintiffs offer cogent evidence"—"direct
 10 evidence," "competent evidence," "adequate evidence" that he described over several pages—to
 11 support a but-for world that "requires no speculation." *Id.* at *13-*14. He explained, "We construct
 12 the but-for world not out of whole cloth, but as a matter of reasoned deviation from the actual
 13 world based upon our changed assumption of defendants' lawful conduct." *Id.* at *15.
 14 Economides's but-for world has no such real-world grounding and is underpinned solely by
 15 speculation. It is "construct[ed] . . . out of whole cloth." *Id.* When asked, [REDACTED]

16 [REDACTED] Economides
 17 could not give a single one. Ex. 3, Economides Tr. 115:13-17.

18 Recognizing this glaring deficiency, in their opposition Users for the first time point to
 19 Meta offering Facebook Credits for viewing video ads in 2011 as supposed proof of real-world
 20 payment to users. If this program was a "basis or reason[]" for Economides's opinion, then Users
 21 failed to disclose it as required because he never cites or references it in his reports. Fed. R. Civ.
 22 P. 26(a)(2)(B)(i). In any event, a program offering Facebook Credits "in return for viewing video
 23 ads" (Opp. 6) that was [REDACTED]

24 [REDACTED] offers no support that Meta would
 25 have ever offered a uniform payment to all users just for using the platform. Ex. 15, PALM-
 26 008405132; Ex. 16, PALM-011944933.

27 Users then cite a draft book chapter by Tucker that they claim "conceded" that "[t]here
 28 are plenty of firms who have sought to set up businesses which would allow individuals to own

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1 their data and trade it for monetary value.”” Opp. 6. But as Tucker explains there, the obscure firms
2 she references (which are not social sites) *failed* to set up thriving businesses. Opp. Ex. 4 at 11-12.
3 Tucker identifies some likely reasons why, and they are the exact reasons why she has opined that
4 Economides’s uniform payment theory is nonviable: because “issues of adverse selection and
5 moral hazard,” as well as the “ubiquity of data and non-rivalry of data,” “might intuitively plague
6 attempts to create such markets.” *Id.* So Users remain where they started: without a single “real
7 world example” of universal, uniform payment to use an attention platform.

8 Nor do Users identify any “record evidence” suggesting Meta would pay users in the
9 manner Economides speculates. Documents that Users argue show Meta [REDACTED]

10 [REDACTED] (Opp. 3) do not prove that Meta
11 would ever completely *upend* that value exchange by offering monetary payment instead of
12 engaging features. And the documents Users cite to claim that [REDACTED]

13 [REDACTED] (Opp. 3) are again rejected proposals, and none to pay all
14 Facebook users just to use it. *See* Opp. Ex. 9, PALM-013785714 (brainstorming [REDACTED]
15 [REDACTED]

16 [REDACTED]); Opp. Ex. 10, PALM-
17 013788535 [REDACTED]

18 [REDACTED]
19 [REDACTED]; Opp. Ex. 11, PALM-013553009 (email from team that
20 was [REDACTED]

21 [REDACTED]
22 [REDACTED]); Opp. Ex. 12, PALM-013818575 at -013818628
23 (discussing an ultimately rejected idea to [REDACTED]

24 [REDACTED]
25 [REDACTED]). Economides acknowledged this fact, stating, [REDACTED]

26 [REDACTED]
27 [REDACTED] and [REDACTED]

28 [REDACTED] Ex. 3, Economides Tr. 110:1-3, 110:5-6. As for Users’ reference to “average revenue per

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1 user,” that Meta calculates its average revenue per user says nothing about Meta *paying* a flat
 2 amount to every user—as the term suggests, it is simply an average, with some users providing
 3 higher revenue to Meta and others providing [REDACTED] Ex. 17, Baser Tr. 273:14-275:17; *see*
 4 *also* Ex. 18, J. Eide Tr. 273:20-274:5 (noting [REDACTED]).

5 **II. ECONOMIDES FAILED TO ACCOUNT AND ADJUST FOR MAJOR DIFFERENCES BETWEEN**
 6 **HIS PUTATIVE YARDSTICKS AND FACEBOOK**

7 Courts exclude purported “yardstick” analysis that fails to account for major differences
 8 between the supposed yardsticks and the market or firm at issue. Yardsticks must be comparable
 9 to the market or firm at issue to be reliable. Mot. 9-13; *see also, e.g.*, *Image Tech. Servs., Inc. v.*
 10 *Eastman Kodak Co.*, 125 F.3d 1195, 1222 (9th Cir. 1997) (there must be “meaningful economic
 11 similarity between [defendants] and the firms used for comparison”); *Home Placement Serv., Inc.*
 12 *v. Providence J. Co.*, 819 F.2d 1199, 1206 (1st Cir. 1987) (“Central to this so-called ‘yardstick’
 13 approach to proving antitrust damages is the requirement the plaintiff identify a sufficiently
 14 comparable firm (the ‘yardstick’) against which it can measure its quantum of damages.”);
 15 *Shannon v. Crowley*, 538 F. Supp. 476, 481 (N.D. Cal. 1981) (“The yardstick method requires a
 16 comparison of the plaintiff’s own business with one nearly as identical as possible.”); Phillip E.
 17 Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their*
 18 *Application* ¶ 392 (4th & 3d eds., 2023 Cum. Supp. 2018-2023) (“The major difficulty encountered
 19 in the use of a yardstick is finding a suitable one. The central idea behind the yardstick approach
 20 is to find a firm that is comparable in all important respects to the plaintiff.”).

21 There is no dispute how this methodology ought to work, despite Users’ efforts to drum
 22 one up. Yardsticks need not be “perfectly identical.” Opp. 14. Nor must they come from the same
 23 product market. *See* Dkt. 663-1 at 5 (Meta’s Opp. to Users’ Mot. to Exclude Tucker). They must
 24 be “comparable” and “[i]f there is an important difference *that is beyond adjustment*, this approach
 25 will have to be abandoned.” Mot. 10 (quoting Areeda & Hovenkamp ¶ 395b3).

26 For that reason, failing to adjust for material differences is not “fodder for cross-
 27 examination” or a “factual criticism.” Opp. 10. It is a methodological fatal flaw that renders the
 28 analysis unreliable and inadmissible. *See, e.g.*, *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d

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1 966, 973 (C.D. Cal. 2012) (excluding opinion for failure to “account[] for the major factors” in
 2 yardstick comparability); *Loeffel Steel Prod., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 812
 3 (N.D. Ill. 2005), *amended*, 2005 WL 8178971 (N.D. Ill. Sept. 8, 2005) (finding a damages model
 4 that lacked “the requisite showing of comparability” to be “impermissibly speculative and
 5 conjectural”); *see also Flintkote Co. v. Lysfjord*, 246 F.2d 368, 393 (9th Cir. 1957) (“Where no
 6 basis for comparison was shown, such [yardstick] evidence has been rejected.”).

7 The differences between Economides’s so-called yardsticks and Facebook are material.
 8 The market research programs he examines meet none of the five criteria of “social networks” that
 9 he made up, they collect different kinds of data than he claims Meta would pay for, they have a
 10 minuscule number of participants compared to Facebook’s user base, and they offer nothing in
 11 return *besides* monetary payment. There is simply no “factual dispute” over whether they differ.
 12 Opp. 9. Take the differences in data collected. Users have claimed that Economides’s supposed
 13 yardsticks are examples “where Facebook and other companies compensated users for *the exact*
 14 *sort of data at issue here.*” Dkt. 648 (Users Class Cert. Mot.) at 2; *see also* Dkt. 649 (Users’ Mot.
 15 to Exclude Tucker) at 4 (citing allegedly “multiple examples where Facebook itself paid for *the exact*
 16 *same type of user data at issue in this case*”). They recognize that this data comparability is
 17 critical, and so they argued repeatedly the data was “*the exact same.*”

18 Economides, however, admitted that it is not. He testified that [REDACTED]

19 [REDACTED] Ex. 13, Economides

20 Tr. 196:24-197:1.⁴ As for the non-Facebook programs, Economides testified that [REDACTED]

21 [REDACTED]

22 [REDACTED] *Id.* at 197:16-19; *see also id.* at 198:2-4 [REDACTED]

23 [REDACTED]

24 [REDACTED].⁵ The question, then, is what Economides did to adjust for those differences.

25 ⁴ He said so repeatedly: [REDACTED]

26 [REDACTED]

27 *id.* at 155:18-23;

28 [REDACTED] *id.* at 160:20-23;

[REDACTED] *id.* at 161:3-5.

29 ⁵ Users claim Meta [REDACTED]

(Opp. 13), but the documents cited were

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1 The answer: nothing. He looks at market research programs and derives from them █
 2 █ And that is the amount he says Meta would pay people
 3 to use Facebook. He did not adjust it for the admittedly different types of “data” those programs
 4 and Facebook collect. Nor did he adjust █ for the exponentially higher number of Facebook
 5 users. Or to account for the value Facebook users already get from using the service. He did not
 6 make any adjustments to account for these major differences at all. That is grounds for exclusion.
 7 *See, e.g., In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d at 974.

8 Users’ excuses for Economides skipping this step lack merit. They claim that he didn’t
 9 have to adjust for the exponentially different scale of these programs and Facebook █
 10 █ . Opp. 4. This
 11 explanation does not justify leaving unadjusted the amount of payment to a few thousand people
 12 when applying it to hundreds of millions. *See* Mot. 12. Users also claim that Economides
 13 *intentionally* selected yardsticks that offer no independent value █
 14 █ . Opp. 4. But that does not explain why Economides did not *adjust* that supposedly
 15 isolated price, at all, for a service like Facebook that *does* provide very valuable independent
 16 services—which, as a matter of economics and logic, people would require less payment to use (in
 17 actuality, no payment at all—for hundreds of millions of real-world users). Last, after quietly
 18 walking back their insistence that Facebook and the putative yardsticks collect the “exact same”
 19 data—now it is “the same *general type of* data at issue in this case,” Opp. 4—Users proclaim that
 20 Economides’s failure to adjust made his calculation conservative because Facebook █
 21 █ . Opp. 4-5. They do not identify the differences in
 22 the data or explain what makes one more intrusive. Little wonder, since until now they have
 23 insisted the data was the “exact same.” All they say is that the so-called yardsticks use their data
 24 differently █ . But
 25 different *uses* say nothing about—to quote Economides—the fact that █
 26 █ Ex. 13, Economides Tr. 198:2-4. Having
 27 _____
 28 brainstorming █ Ex. 2, Economides Reply Rep. ¶¶ 149-150,
 29 —and those brainstormed ideas were then rejected not implemented.

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1 explained nothing about this [REDACTED] Economides cannot claim his failure to perform a
 2 necessary step in yardstick analysis was uniformly “conservative”—he hasn’t done the work.

3 **III. BEFORE BEING RETAINED, ECONOMIDES THOUGHT PAYMENT WOULD GO TO ONLY
 4 SOME USERS, AND TO THOSE FEW IN INDIVIDUALIZED, UNEQUAL AMOUNTS**

5 Economides’s scholarship about hypothetical payment by attention platforms is fatal to
 6 Users’ class certification bid. Meta pointed this out (Mot. 9) but did not offer it as an independent
 7 basis to exclude his opinions. Users nevertheless build a strawman exclusion argument. Meta
 8 won’t say much about this supposed debate over what Economides did or didn’t write—his short
 9 article on the subject is attached for the Court’s reference. *See* Ex. 19. Here is the key part:

10 In the competitive world, users by default would opt-out from the market
 11 for sale of personal information. If a user wanted to enter this market, she would
 12 opt-in, sell her personal information and get compensated by the digital platform.
 13 Compensation would depend on the value of the information of a particular user to
 14 the platform. A user would accept the offer and participate in market B [the market
 15 for sale of personal information] if the monetary compensation exceeds her value
 16 of the loss of privacy implied by the transaction.

17 Users vary widely on the value they place on privacy and in the value of
 18 their personal information to the platform. Therefore, in a competitive market for
 19 personal information, some users would participate, and others would not.
 20 Transaction prices for the sale of personal information would also vary and likely
 21 be individually negotiated between the platform and the user.

22 Ex. 19, Economides & Lianos, *Giving Away*.

23 It is clear why Users are worried about this prior scholarship. It establishes “the possible
 24 presence of uninjured class members,” which “means that the class definition is fatally overbroad.”
 25 *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022)
 26 (en banc). It also shows “the complexity of the individualized questions” of “individualized injury
 27 and damages assessments” in this case, which make class certification “improper.” *Bowerman v.*
 28 *Field Asset Servs., Inc.*, 60 F.4th 459, 469, 471 (9th Cir. 2023). In short, it shows that, if the views
 of Economides the scholar are accepted, the Court cannot certify the Users’ class.

29 **IV. ECONOMIDES CANNOT OPINE THAT PRIVACY POLICES ARE “CONFUSING”**

30 Economides’s opinion in Section IV(C) of his reply report that “Facebook’s Data Practices
 31 and User Settings Were Confusing” has no basis but his personal interpretation of documents in
 32 the record, as a layperson. Economides agreed: his opinion that Facebook’s privacy policy is

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1 complex is [REDACTED] that he came to not as an economist but [REDACTED] Ex. 3,
 2 Economides Tr. 47:24-48:6. This opinion should be excluded.

3 Users respond that Economides can offer these opinions (1) to rebut Meta's expert
 4 Catherine Tucker, or at least to offer background for his rebuttal, or (2) because Economides's
 5 "academic work has involved issues regarding privacy." Opp. 15. Both responses are off base.

6 First, Economides's restatement and interpretation of record evidence in Section IV(C) is
 7 not a rebuttal to Tucker. The one paragraph of Tucker's report cited in Section IV(C)—or in Users'
 8 opposition—is Paragraph 59, which states in full: [REDACTED]

9 [REDACTED]
 10 [REDACTED] Economides's Section IV(C)
 11 neither analyzes nor even cites this academic literature or Named Plaintiffs' behavior. The record
 12 evidence that it restates, and the opinion that it offers that Facebook's practices and settings were
 13 "confusing," say nothing about whether survey responses reliably reveal users' preferences about
 14 privacy or data collection and use. In any event, Users cite no case holding that experts may offer
 15 unspecialized, lay opinion just so long as it is in rebuttal, and that is obviously wrong.

16 Nor does this section of Economides's report merely "provide factual context," *Huawei*
 17 *Techs., Co, Ltd v. Samsung Elecs. Co., Ltd.*, 340 F. Supp. 3d 934, 992-993 (N.D. Cal. 2018), or
 18 "summarize the facts and data considered," *In re Glumetza Antitrust Litig.*, 2021 WL 3773621, at
 19 *20 (N.D. Cal. Aug. 25, 2021). It just "restate[s] or summarize[s] record evidence and then state[s]
 20 a conclusion"—that Facebook's data practices and user settings were confusing—"without
 21 applying a methodology that is reliable and which evinces [any] expertise." *Siqueiros v. Gen.*
 22 *Motors LLC*, 2022 WL 74182, at *9 (N.D. Cal. Jan. 7, 2022). That compels exclusion.

23 Second, it is irrelevant whether Economides's academic work has involved privacy. At
 24 issue is the opinion Economides offered *in this case*. That opinion was not based on any "scientific,
 25 technical, or other specialized knowledge" at all, Fed R. Evid. 702(a), so it should be excluded.

CONCLUSION

27 The Court should exclude Economides's testimony drawn from Parts X-XII of his opening
 28 report and Section IV(C) and Parts VI-VII of his reply report.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2023, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System.

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